

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

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| In re:<br>HARDIEPLANK FIBER CEMENT<br>SIDING LITIGATION | ----- | Case No. 12-md-2359<br>MDL No. 2359<br>ALL CASES |
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**JOINT CASE MANAGEMENT CONFERENCE STATEMENT**

The counsel identified below participated in the meeting required by Federal Rule of Civil Procedure 26(f) by e-mail throughout the month of August and telephonically on August 29, 2012 and September 4, 2012. Counsel jointly prepared the following report in accordance with Local Rule 16.2.

The pretrial conference in this matter is scheduled for Wednesday, September 12, 2012, at 9:00 a.m., before Chief United States District Judge Michael J. Davis, United States Courthouse, Minneapolis, Minnesota. The parties do not request that the pretrial be held by telephone.

**(A) DESCRIPTION OF THE CASE**

MDL No. 2359 currently consists of the following nine actions ("the Actions") brought against Defendant James Hardie Building Products Inc. ("Defendant"), which have the following statuses:

| Plaintiff/Case No.          | Status   |
|-----------------------------|--|
| <i>Picht</i> (11 C 958)     | <p>This action was originally removed to this Court on April 18, 2011. On July 5, 2011, Defendant moved for summary judgment and for dismissal under Rule 9(b). (<i>See</i> Docs. 25-31.) On September 7, 2011, the Court entered a Pretrial Order allowing for staged discovery, with the first stage limited to specific issues raised in Defendant's summary judgment motion. (Docs. 51, 52.) Defendant's summary judgment motion has been fully briefed. (<i>See</i> Docs. 77-81.) On March 22, 2012, the Court held a hearing on Defendant's motion and took the motion under advisement. (Doc. 92.)</p> <p>On May 30, 2012, the Court entered an amended scheduling order directing Plaintiff to disclose her experts in support of class certification by August 28, 2012, Defendant to disclose its expert by September 28, 2012, and the parties to submit any supplemental expert reports on October 15, 2012. (<i>See</i> Doc. 97.) That order expressly did not change any other dates in the September 7, 2011 Pretrial Order. (<i>Id.</i> at ¶ 4.)</p> |
| <i>Bowers</i> (12 C 727)    | <p>This action was originally filed in the District of Minnesota on March 22, 2012 and soon after reassigned to this Court as related to the <i>Picht</i> action. (Doc. 3.) On May 14, 2012, the Magistrate Judge approved a stipulation that Defendant would respond to Plaintiff's complaint in accordance with the schedule set out in the MDL proceeding. (Doc. 12.)</p>   |
| <i>Fenwick</i> (12 C 1391)  | <p>This action was originally filed in the Central District of California on February 6, 2012. It was transferred by the JPML to the MDL proceeding in this district on June 26, 2012 (Doc. 12.) Prior to transfer, the transferee court stayed all proceedings pending the JPML's order (Doc. 7.)</p>   |
| <i>Swiencki</i> (12 C 1392) | <p>This action was originally filed in the Central District of California on February 17, 2012. It was transferred by the JPML to the MDL proceeding in this district on June 26, 2012 (Doc. 13.) Prior to transfer, the transferee court stayed all proceedings pending the JPML's order (Doc. 9.)</p>  |

| Plaintiff/Case No.  | Status   |
|---|--|
| <i>Susan S. Buchanan Personal Residence Trust</i> (12 C 1393) | This action was originally filed in the Middle District of Florida on February 16, 2012. It was transferred by the JPML to the MDL proceeding in this district on June 22, 2012. (Doc. 13.) Prior to transfer, the transferee court stayed all proceedings pending the JPML's order (Doc. 11.) |
| <i>Dillingham</i> (12 C 1296)                                 | This action was originally filed in the Eastern District of California on March 16, 2012. It was transferred by the JPML to the MDL proceeding in this district on June 22, 2012. (Doc. 6.)  |
| <i>Kostos</i> (12 C 1497)                                     | This action was originally filed in the Northern District of Illinois on March 16, 2012. It was transferred by the JPML to the MDL proceeding in this district on June 26, 2012. (Doc. 22.) Prior to transfer, the transferee court stayed all proceedings pending the JPML's order (Doc. 14.) |
| <i>Treece</i> (12 C 1669)                                     | This action was originally filed in the Southern District of Illinois on June 27, 2012. It was transferred by to the MDL proceeding in this district on August 28, 2012. (Doc. 10.)  |
| <i>Kavianpour</i> (E.D. Va. # 12-cv-956)                      | This action was originally filed in the Eastern District of Virginia on August 28, 2012. A Notice of Tag-Along action has been filed with the JPML and the parties anticipate that it will soon be transferred by the JPML to the MDL proceeding in this district.                             |

### 1. Plaintiffs' Summary of Plaintiffs' Claims

The actions consolidated under MDL No. 2359 all relate to fiber cement siding allegedly manufactured by Defendant. The core claims in the various complaints generally allege that Defendant's siding was improperly designed and manufactured, failed to live up to its warranted representations, failed to live up to its marketing statements, failing to adequately instruct, and otherwise damaged the structures to which the siding was affixed. Specifically, the siding is subject to two problems: 1) Premature

failing due to product shrinkage resulting in gapping, cracking, flaking, and delamination of the material; and 2) Discoloration resulting from the failure of the sealant, a PH imbalance, and the failure of the substrate to hold the stain or paint. All of these issues arose despite the fact that the materials were designed and marketed as being formulated to withstand the condition in various zones throughout the country, despite the marketing promises of “no” or “low” maintenance, and contrary to the statements that the Hardie product was superior to alternative natural and composite materials.

Plaintiffs currently allege in the various complaints both national and state-by-state classes and/or subclasses. Plaintiffs believe that the common issues of law and fact predominate.

## **2. Defendant's Summary of Defendant's Claims and Defenses**

Defendant denies that its siding, which has been installed on over 5.5 million homes in the United States, has a defect or fails prematurely. Defendant has a number of defenses to the claims brought by the Plaintiffs in the Actions, including, but not limited to: (1) the applicable statutes of limitations; (2) Plaintiffs' failure to state a claim; (3) Plaintiffs' failure to install the siding correctly; (4) the improper use of third-party stains or coatings on the siding; (5) Plaintiffs' remedies are limited by the express terms of the Defendant's limited warranties; and (6) Plaintiffs' failures to follow the terms of Defendant's limited warranties. Indeed, Defendant has a fully-briefed and argued motion for summary judgment and to dismiss under Rule 9(b) in the *Picht* action. This Court took the motion under advisement on March 22, 2012. (Doc. 92.) Defendant also denies that this action can be maintained as a class action because of, among other things,

disparities in the quality of the installation of the siding on Plaintiffs' homes by their builders or installers, the improper use of third-party stains and coatings on the siding, as well as the varying environmental conditions to which the siding was exposed during the terms of the warranties. Defendant has not asserted any counterclaims at this time.

**3. Statement of Jurisdiction**

This Court has jurisdiction over the Actions pursuant to 28 U.S.C. § 1332(d)(2) because a member of the putative class of plaintiffs is a citizen of a state different from the state of the Defendant, the putative class has more than 100 members, and the aggregate amount in controversy exceeds \$5,000,000, exclusive of interest and costs.

**4. Summary of Factual Stipulations or Agreements**

None at this time.

**5. Jury Trial Demand**

Plaintiffs have demanded a trial by jury in each of the Actions.

**6. Statement Regarding Rules of Procedure for Expedited Trials**

The parties have not agreed to the Rules of Procedure for Expedited Trials of the United States District Court, District of Minnesota.

**7. Transfer and Consolidation**

Plaintiffs propose that all actions pending in or transferred to the United States District Court for the District of Minnesota before the date 5 months following Defendant's filing of an answer that assert claims arising from or relating to purchases of Defendant's siding are hereby transferred to this Court's docket and consolidated with the Actions for pretrial purposes. Plaintiffs propose that all actions filed in or transferred to

this District on or after the date 5 months following Defendant's filing of an answer asserting claims arising from or relating to purchases of Defendant's siding shall be stayed as individual tag-along actions.

Defendant proposes that all actions pending in or transferred to the United States District Court for the District of Minnesota before April 16, 2013 that assert claims arising from or relating to purchases of Defendant's siding are hereby transferred to this Court's docket and consolidated with the Actions for pretrial purposes. Defendant proposes that all actions filed in or transferred to this District on or after April 16, 2013 asserting claims arising from or relating to purchases of Defendant's siding shall be stayed as individual tag-along actions.

**8. Other Matters**

**(a) No Effect on Claims or Defenses.**

The terms of this Order shall not have the effect of making any person, firm, or corporation a party to any action in which he, she or it has not been properly named, served or joined, in accordance with the Federal Rules of Civil Procedure. The terms of this Order and the consolidation ordered herein, and Defendant's consent thereto, shall not constitute a waiver by any party of any claims in or defenses to any of the Actions.

**(b) Case Caption.**

Every paper filed in these consolidated proceedings, or in any separate action included therein, should bear the following caption:

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

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|   |                                     |
|---|-------------------------------------|
| In re:<br>HARDIEPLANK FIBER CEMENT<br>SIDING LITIGATION | Case No. 12-md-2359<br>MDL No. 2359 |
|---|-------------------------------------|

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**(c) All Cases.**

When a paper is intended to be applicable to all of the actions to which this Order is applicable, the words "ALL CASES" should appear below the words "Case No. 12-md-2359" and "MDL No. 2359" in the caption.

**(d) Specific Cases.**

When a paper is intended to apply only to some, but not to all of such actions, this Court's docket number for each individual action to which the paper is intended to be applicable and the last name of the named plaintiff in said action should appear immediately below the words "MDL No. 2359" in the caption described above, *e.g.*, "No. 11 C 958, Picht." The words "Case No. 12-md-2359" should be deleted.

All orders, pleadings, motions, and other documents that are normally filed in a civil action as required by Federal Rule of Civil Procedure 5 and that relate only to an individual case shall be filed in the MDL No. 2359 case as well as in the individual case. A document that relates to all actions should be filed only in the MDL No. 2359 case.

**(e) Defendant's Proposed Management Counsel**

Defendant has designated Christopher M. Murphy of the law firm of McDermott Will & Emery LLP as its lead counsel. There is no objection by Plaintiffs to this designation.

**(f) Plaintiffs' Proposed Management Counsel.**

Plaintiffs have designated Robert K. Shelquist of the law firm of Lockridge Grindal Nauen, P.L.L.P. (Minneapolis, Minnesota) as their lead counsel.

Plaintiffs ask that the following be appointed as members of the Executive Committee:

Clayton Halunen of Halunen & Associates (Minneapolis, Minnesota)  
Michael McShane of Audet & Partners (San Francisco, California)  
Charles LaDuca of Cuneo Gilbert & LaDuca (Bethesda, Maryland)  
Charles Schaffer of Levin, Fishbein, Sedran & Berman (Philadelphia, Pennsylvania)  
Shanon Carson of Berger & Montague (Philadelphia, Pennsylvania)  
Nicholas Drakulich of The Drakulich Firm (San Diego, California)  
D. Michael Campbell of Campbell Law (Lakeland, Florida)  
Shawn Wanta of Baillon, Thome, Jozwiak, Miller & Wanta (Minneapolis, Minnesota)

There is no objection by Defendant to these designations.

**(g) Coordination.**

Plaintiffs shall, to the extent practicable, seek to coordinate their efforts, including discovery efforts and motion practice, among themselves for efficient and prompt management of the Actions.



**(h) Privilege of Coordination Efforts.**

Cooperation among Plaintiffs to coordinate motion practice, discovery, or to otherwise minimize burdens and expenses in this litigation is encouraged by this Court and shall not constitute evidence of bad faith, conspiracy, concerted action, or any other wrongful or unlawful conduct. The fact of such cooperation and/or communication(s) as a result of such cooperation: (1) shall not be communicated to the trier of fact in this litigation under any circumstances; and (2) shall not be otherwise used in any other litigation. All information and documents exchanged among Plaintiffs for purposes of prosecuting this litigation are communicated for the limited purpose of assisting in a common cause and shall not constitute a waiver of the attorney-client privilege, work product doctrine, or any other applicable privilege or protection.

**(i) Attorneys' Time and Expense Records**

All counsel who may seek to recover court-awarded attorneys' fees shall keep a daily record of their time and expenses incurred in connection with the Actions, indicating with specificity the hours, locations and particular activity and shall, by the fifteenth day of each month, submit to Plaintiffs' Lead Counsel a report of their time and expense records for the preceding month.

**(B) PRETRIAL DISCOVERY AND EXPERT SCHEDULE AND CLASS CERTIFICATION MOTION PRACTICE**

1. The parties each propose the following discovery plan:

| Activity  | Plaintiffs' Proposal                                | Defendant's Proposal |
|---|---|----------------------|
| Plaintiffs shall file a Consolidated Complaint ("Consolidated Complaint")   | November 16, 2012                                   | November 16, 2012    |
| Defendant must answer, move or otherwise respond to the Consolidated Complaint  | December 21, 2012                                   | December 21, 2012    |
| Deadline for joinder of parties and amendment of pleadings  | 5 months following Defendant's filing of an answer  | April 16, 2013       |
| Plaintiffs shall produce any expert reports and other information required by Fed. R. Civ. P. 26(a)(2)(B) for class certification | 10 months following Defendant's filing of an answer | April 16, 2013       |
| Defendant may depose Plaintiffs' experts, if any  | 12 months following Defendant's filing of an answer | June 15, 2013        |
| Defendant shall produce any expert reports and other information required by Fed. R. Civ. P. 26(a)(2)(B) for class certification  | 12 months following Defendant's filing of an answer | June 15, 2013        |
| Plaintiffs may depose Defendant's experts, if any   | 13 months following Defendant's filing of an answer | July 16, 2013        |
| Plaintiffs' opening brief in support of their Motion for Class Certification shall be filed                                       | 13 months following Defendant's filing of an answer | July 16, 2013        |
| Any Daubert motions by either party must be filed   | 14 months following Defendant's filing of an answer | August 16, 2013      |

| Activity   | Plaintiffs' Proposal                                | Defendant's Proposal |
|--|---|----------------------|
| Defendant's Opposition to Plaintiffs' Motion for Class Certification shall be filed            | 15 months following Defendant's filing of an answer | September 16, 2013   |
| Plaintiffs granted leave to file a reply brief in support their Motion for Class Certification | 16 months following Defendant's filing of an answer | October 16, 2013     |

2. If Defendant files a motion to dismiss the Consolidated Complaint, Plaintiffs shall file their joint response 30 days after the filing of the motion. Defendant will then have 21 days to reply to Plaintiffs' joint response. Defendant's opening brief will be limited to 25 pages, Plaintiffs' joint response brief will be limited to 25 pages, and Defendant's reply brief will be limited to 15 pages.

3. The parties agree that Plaintiffs' opening brief in support of their Motion for Class Certification shall be limited to 40 pages, that Defendant's opposition shall be limited to 60 pages, and Plaintiffs' reply brief (if granted leave) shall be limited to 20 pages.

**(C) DISCOVERY LIMITATIONS AND OTHER DISCOVERY AGREEMENTS**

**(1) Discovery Limitations.**

The parties agree that they shall be limited to the following numbers of discovery procedures:

- 50 interrogatories (including subparts) by Plaintiffs collectively to Defendant, and 50 interrogatories (including subparts) by Defendant to each Plaintiff;

- 40 document requests (including subparts) by Plaintiffs collectively to Defendant, and 40 document requests (including subparts) by Defendant to Plaintiffs collectively;
- 15 depositions (not including expert depositions) by Plaintiffs collectively. Defendant may take the depositions of all named Plaintiffs as well as 10 other depositions (not including expert depositions);
- 25 requests for admission (including subparts) by Plaintiffs collectively to Defendant, and 25 requests for admission (including subparts) by Defendant to each Plaintiff.

**(2) Discovery Agreements**

**(a) Dispute Resolution.**

To avoid unnecessary litigation concerning discovery disputes, counsel will meet and confer pursuant to Local Rule 7.1(a) before contacting the Court on discovery matters or filing a motion concerning discovery. In the event the parties are unable to resolve their differences after meeting and conferring, then a party may bring the dispute to the Court's attention by motion. Discovery motions must be accompanied by a notice of presentment specifying the date and time on which the motion will be presented to the Court.

**(b) Document Production.**

Documents produced by Defendant shall be produced in an electronic format on a CD or DVD to Plaintiffs' lead counsel (or his designee) who shall copy or reproduce each CD or DVD for the benefit of all of the Plaintiffs. Documents produced by each

Plaintiff shall be produced in an electronic format on a CD or DVD to Defendant's lead counsel (or his designee). In addition, Defendant shall be permitted to serve requests upon each Plaintiff pursuant to Fed. R. Civ. P. 34(a)(2) for the purpose of entering onto the Plaintiffs' land for inspection and other purposes.

**(c) Suspension of Fed. R. Civ. P. 26(a)(1).**

The parties discussed and agreed that suspending the requirements of Federal Rule of Civil Procedure 26(a)(1) would be most efficient in this case.

**(d) Depositions - Generally.**

The procedures governing and limiting depositions, including resolution of any disputes arising during depositions, shall be in accordance with the Federal Rules of Civil Procedure. Counsel are required to cooperate with, and be courteous to, each other and each deponent.

**(e) Scheduling of Depositions.**

Absent extraordinary circumstances, counsel shall consult in advance in an effort to schedule depositions at mutually convenient times and places. Plaintiffs' lead counsel (or his designee) and Defendant's lead counsel (or his designee) shall attempt to establish by mutual agreement a schedule for depositions in this proceeding that reflects sequencing consistent with (a) the availability of documents from among those produced by the parties and third parties; and (b) the objective of avoiding the need to subject any person to repeated depositions. The parties shall work cooperatively to ensure a fair and orderly process for the scheduling of depositions, and shall comply with all of the other directives set forth in this Order. Depositions shall not be allowed, without leave of

Court or by agreement of the parties, on less than fourteen days' notice. Unless otherwise agreed by the parties or ordered by the Court, the depositions of the named Plaintiffs shall take place within the judicial districts of their respective residences.

**(f) Service and Filing of Discovery Documents.**

Pursuant to Rule 5(d) of the Federal Rules of Civil Procedure, discovery requests and responses will not be filed with the Court, except when specifically ordered by the Court or to the extent they are presented in connection with a motion. Discovery requests and responses shall be served by electronic mail on Plaintiffs' lead counsel or his designee (who shall circulate the requests and responses to all of the other counsel representing the Plaintiffs) and Defendant's lead counsel or his designee (who shall circulate the requests and responses to all other counsel for the Defendant).

**(g) Application of Rules of the Court.**

Except as otherwise provided herein or by further order of the Court, the Federal Rules of Civil Procedure and the Local Rules of the United States District Court for the District of Minnesota shall govern all further discovery matters in these consolidated actions.

**(h) Management of Discovery Issues.**

The parties discussed and agreed that they would work together to develop a uniform numbering system to allow for the ease of identification of discovery documents. The parties also discussed the use of establishing a document depository or computer storage system to facilitate document management issues. The parties agreed that they

would both create separate document storage systems but work together to eliminate discovery issues as outlined herein.

**(i) Privilege Log – Timing.**

A privilege log which complies with the requirements of the Federal Rules of Civil Procedure shall be served by any party withholding documents on the basis of privilege or work product protection within 60 days after production of the responsive documents from which the allegedly privileged or protected documents are being withheld. Notwithstanding the foregoing sentence, a final privilege log shall be served no later than 30 days after a party certifies that it has substantially completed its document production.

**(j) Privilege Log - Categories of documents that do not need to be logged.**

The parties do not need to log any of the following categories of withheld documents:

- Attorney-client privileged communications or work product protected documents regarding this or similar litigation written by, to, between, or on behalf of any of the parties or their representatives or counsel after March 30, 2011;
- Communications among counsel for Defendant or among counsel for Plaintiff relating to joint litigation efforts following the commencement of any of the actions that are a part of MDL No. 2359; and
- Communications, which are by, to, or between any party to this litigation or its counsel, and/or a consultant retained for the party in respect to this litigation or related

litigation or in anticipation thereof, which have been withheld from production, in whole or part, based upon a claim of work product protection and which pertain exclusively to the issues in the Actions, except to the extent production or logging is required by the terms of other Court orders or by agreement of the parties.

**(k) Draft Expert Reports.**

Consistent with Federal Rule of Civil Procedure 26(b)(4), the parties further agree that an expert's draft reports are work product and shall not be discoverable and that communications between an expert and the attorney who retained the expert, including notes reflecting their communications, are not discoverable. However, counsel may obtain through discovery any facts or data the expert relied upon in forming his or her opinions, including those facts or data that were provided by counsel. Counsel may also fully inquire of an expert what facts or data the expert considered in reaching his or her opinion, whether the expert considered alternative approaches, or into the validity of the expert's opinions.

**(l) Inadvertent Production of Privileged or Other Protected**

**Information.** The parties will stipulate to a protective order that provides the procedure for handling inadvertent production of privileged or other protected information.

**(m) Duty to Preserve.**

The parties agree that they shall meet and work together to submit an agreed Preservation Order that will detail both the obligations of each to preserve certain evidence and the plan for the production and sharing of same.



**(n) Inspection/Removal of Siding.**

Plaintiffs shall afford Defendant the right to inspect and/or test siding from their properties during any period of fact discovery in this consolidated action (the "Inspection Time Period"), provided Defendant provides prior notice to Plaintiffs' counsel. If a Plaintiff must or chooses to replace his/her James Hardie siding during the pendency of this MDL, then the Plaintiff must provide Defendant with 60-day's prior notice and, if requested, will grant Defendant and its designees the right to be present for any testing and inspection undertaken by the Plaintiff's designee(s). In addition, the Defendant's designee(s) may conduct their own testing and inspection. Either side may take as many siding samples it deems sufficient for purposes of the lawsuit and shall share such samples as agreed to or ordered by the Court. After the inspections and the removal of siding, the Plaintiff has no duty to preserve all removed siding, but may do so at his/her choosing. Defendant agrees that it will not argue that the Plaintiff "spoliated" such evidence if he/she chooses not to preserve the siding, but nothing shall prevent Defendant from arguing that the Plaintiff has failed to meet his/her burden of proof as to all or any part of his/her claim as a result of the siding not being preserved. If both sides demand possession of the removed siding, then the parties will meet and confer to establish a storage facility and cost sharing arrangements. Defendant shall similarly allow Plaintiffs the right to test representative samples of Defendant's siding from its plants during the Inspection Time Period, provided Plaintiffs provide prior notice to Defendant's counsel.

**(F) TRIAL-READY DATE**

Following the Courts' ruling on Plaintiffs' motion for class certification, the parties, if necessary, will submit a proposed scheduling order setting forth the time for the close of any further discovery, the time for filing of dispositive motions and related briefing, and pre-trial and trial deadlines. Based on the preliminary nature of this case, the parties agree that an estimate of trial length at this time would be premature. Should this case not be disposed of prior to trial, the parties anticipate the case will be ready for trial in 2014, at a date to be determined by the Court.

**(G) INSURANCE CARRIERS/INDEMNITORS**

Defendant will produce for inspection and copying any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

**(H) SETTLEMENT**

The parties agree that any settlement discussions are premature at this point. Plaintiffs suggest that mediation before the magistrate judge or a third-party neutral is appropriate after the factual record has been developed.

**(I) TRIAL BY MAGISTRATE JUDGE**

The parties have not agreed to consent to jurisdiction by the Magistrate Judge pursuant to 28 U.S.C. § 636(c).

Dated: September 6, 2012

Jointly submitted,

**Counsel for Plaintiffs**

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